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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937
No. 87

WILLIAM D. FRAD,
Relator-Appellant,

against

JOHN J. KELLY, United States Marshal for the Southern District of New York, UNITED STATES OF AMERICA,
Appellee.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF WILLIAM D. FRAD, APPELLANT.

HARRIS JAY GRISTON, and
LOUIS KARASIK, Esqs.,
Attorneys for William D. Frad,
80 Broad Street,
New York City.

HARRIS JAY GRISTON, Esq.,
Of Counsel on the Brief.

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ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF WILLIAM D. FRAD, APPELLANT.

Statement.

Relator William D. Frad appeals from an order of the Circuit Court of Appeals, Second Circuit, State of New York, which reversed (with an opinion, reported in *Kelly* v. *United States*, 89 Fed. (2) 866), the following two orders made by the Hon. William Bondy in the District Court for the Southern District of New York on the 26th day of January, 1937:

(1) An order (R. 132-133) denying the Government's motion "for an order committing the above named defendant William D. Frad to a penitentiary to be designated by the Attorney General of the United States," wherein the defendant should serve a purported "unserved portion" of a purported, but non-existent, four

year sentence, under indictments C 96-120 and C 80-944 (R. 121).

(2) An order (R. 134-137) sustaining a Writ of Habeas Corpus, granted to William D. Frad, who had theretofore been arrested under a warrant, issued pursuant to the following order of Judge Caffey (R. 32):

> "It appearing to the said Court that on March 26th, 1934, this Court suspended sentence on the above-named defendant and placed *him* on probation pursuant to the Act of March 4, 1925, and *that the above named Defendant has violated one of the terms of his probation,* that is: he has committed larceny by trick on the high seas.
>
> NOW THEREFORE, it is ordered that a warrant issue for the arrest of said probationer William Frad." (Italics ours.)

That order for the warrant was granted on the petition of E. Fred Sweet, Probation Officer for the Southern District of New York, which petition (R. 33-34) *failed to call the court's attention to an order which had been made and entered in this proceeding,* by Judge Inch prior thereto, under date of December 16, 1935 (R. 28-29), and which is on file with the clerk of the court for the Southern District of New York (R. 107), which order provided as follows (R. 29):

> "ORDERED, that the order or probation made herein on the 26th day of March, 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is discharged from further supervision and the proceedings against him in this cause be, and the same are hereby terminated."

The District Court opinion written by Judge Bondy is in the record (R. 129-131).

Jurisdiction.

The jurisdiction of this Court is invoked under *Section 240(a)* of the *Judiciary Code,* as amended by the Act of

February 13, 1925 (43 Stat. 938). The order for mandate of the Circuit Court of Appeals was entered May 17, 1937.

Statutes and Rules Involved.

The Statutes involved are *Title 18, U. S. Code, Sections 557, 724-726* (The *Probation Act*) and *Title 28, U. S. Code, Sections 22, 23, 481-475.*

Summary Statement of Matter Involved.

On March 21, 1934, the appellant, William D. Frad, came on for trial before Hon. Robert A. Inch, District Judge, and a jury, under three indictments, namely C 96-120, C 96-116 and C 80-944 (R. 21).

Before a jury was selected, he pleaded guilty to all three indictments (R. 22). Sentence was deferred until the 26th of March, 1934.

Hon. Robert A. Inch is a District Judge of the Eastern District of New York, who had been temporarily assigned to the Southern District of New York for the March 1934 Term, after the termination of which term he returned to his home district (R. 82).

The indictments were as follows:

Indictments C 96-116, charged him with conspiracy to violate Sections 211, 220 and 227, Title 22 U. S. Code under Section C 88 Title 18 U. S. Code (R. 9-14).

Indictment C 80-944, charged him in five counts with using passports obtained by false statements as to his identity (Sections 220, 221, Title 18, U. S. Code), (R. 4-8).

Indictment C 96-120, charged him in four counts with impersonation, by representing himself to be another person when entering the United States (Section 220, Title 8, U. S. Code), (R. 15-20).

Under the first indictment, he was sentenced to two years imprisonment, and ordered to pay a $1,000 fine, for which he was to stand committed until paid (R. 14).

Under indictment C 96-120, the following disposition was made (R. 19):

> "MAR 26 1934
>
> Imposition of sentence suspended.
> Probation for 4 years, to begin after serving sentence on C 96-116. *Subject to the standing probation* order of this Court.
>
> Inch, J."

The identical disposition was made under indictment C 80-944 (R. 8).

It is important to observe *that no sentence was imposed under indictment C 80-944 or C 96-120,* but that the disposition was *"imposition* of sentence *suspended."*

The appellee paid the fine of $1,000, and he was also committed to the Lewisburg Penitentiary, where he served his full sentence, with allowance off for good behavior, after which, he was discharged on November 2, 1935 (R. 68, 120).

The appellee then entered his term of probation under the other two indictments, and on November 15, 1935 signed the standing orders of the court as to probation (R. 25).

On December 13, 1935, Mr. Karasik, one of appellant's attorneys, attended Judge Inch at his chambers (R. 82), and recalled to him the facts of this case, and the further fact that the sentence had been served and the fine paid on indictment C 96-116, showed him that the appellant was suffering from heart trouble, and asked the court to discharge the appellant from probation, and to terminate the proceedings against him, as permitted by *U. S. C. Sections 724* and *725.*

Judge Inch called in Mr. Printzlein, the Probation Officer of the Eastern District, where the Judge was then sitting, and after discussing the facts (R. 51), told Mr. Karasik to give notice of such application to the Probation Officer of the Southern District (R. 51, 82-83). Such a notice was then prepared and served on the Probation Officer of the Southern District of New York (R. 51, 83). What happened thereafter is best explained in Mr. Karasik's own words, as follows (R. 83):

"I then personally served the papers on the Probation Office, and if your Honor will refer to the original papers you will find that the return day was blank, and I filled it in only when Judge Inch told me that he could hear the motion on certain days. *So I came to inquire personally from the Probation Office which day would be more convenient. He selected a day* and I inserted that day, and on that day, sir, we appeared. The probation officer was there; the defendant was there, and after argument Judge Inch entered an order on December 16, 1935 * * *" (see also R. 51).

Mr. Shears, the District Attorney in charge of this proceeding, now concedes that the Chief Probation Officer of the Southern District of New York received three days notice of hearing (R. 120).

The hearing on that application was heard by Judge Inch in his Chambers in the Eastern District of New York (R. 51, 82, 83). At that hearing Probation Officer Sweet appeared, and opposed the motion *on the merits* (R. 51, 83).

After hearing argument of both sides, Judge Inch stated that the sentence which he had imposed on the first indictment on the plea of guilty was "quite stiff" (R. 91), and that for that reason he had not imposed any sentence on the other two indictments, but had deliberately suspended the imposition of sentence thereon (R. 57-58). He further stated, that, in view of the fact that the fine under that first indictment had been paid and the sentence thereunder served, and in further view of the fact that medical proof submitted, both by doctors' statements and prison records, showed that the petitioner was suffering from serious heart trouble, he would grant the motion.

Subsequently, on December 16, 1935, an order was signed by him providing as follows (R. 29):

"ORDERED, that the order of probation made herein on the 26th day of March, 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is discharged *from further supervision* and the proceedings

against him in this cause be, and the same are hereby terminated."

On a later occasion, when the Government moved to resettle the order, Judge Inch took occasion to restate what he had done in granting that order, and why (R. 57-58):

"Mr. Shears (Assistant District Attorney): The one further step that you did have at that time (December 16, 1935), the right to sentence, if you wished, but you did not at that time intend to sentence this man.

The Court: If for instance, I imagine, I had said, 'I sentence you to two years and suspend the execution of sentence' and then had entered an order such as I did enter, I would have had to impose that sentence or change that sentence in some way.

Mr. Shears: Yes, you would, which would have been void, of course.

The Court: Certainly.

Mr. Shears: You had no right to do it.

The Court: Yes, I had no right to do it. I did not impose sentence on this man on these two counts, thinking that he had suffered enough if he had served his two years, at his age, on the first indictment, especially where he has pleaded guilty and thrown himself on the mercy of the Court.

Mr. Shears: Yes, that is right.

The Court: Now, that being done he walks out, he serves his term, comes back still subject, with his plea of guilty, on two indictments.

Mr. Shears: Yes, that is right.

The Court: No sentence has been imposed.

Mr. Shears: That is right."

The following colloquy also then occurred between Mr. Shears and Judge Inch (R. 56):

"Mr. Shears: Now let me ask you one question which will resolve this entirely, your Honor. It was not your Honor's intention on December 16, 1935, to in any way sentence this man under the original indictment?

The Court: Not the slightest.

Mr. Shears: That is all I wish to know, your Honor.

> The Court: Not the slightest bit. There was no reason for me sentencing him, Mr. Shears; there was no reason for my sentencing him."

It will be observed that the order of December 16, 1935, itself contains the following recital, after other preliminary recitals (R. 29):

> "* * * and *due* notice having been given to the Honorable E. Fred Sweet, Probation Officer for the Southern District of New York; and *due* deliberation having been had thereon * * *" (Italics ours).

That order was captioned (R. 28):

> "UNITED STATES DISTRICT COURT
> Southern District of New York."

Furthermore, that order, so captioned, was entered in the Southern District of New York, was filed in the Southern District of New York, and is still on file in the Southern District of New York; all as required by law (R. 107).

Subsequently, on a petition made against appellant by Probation Officer Sweet (R. 33), based on a complaint against appellant, filed by a special investigator, charging defendant with alleged larceny on the high seas on November 18, 1936 (R. 30), which was itself based on hearsay (R. 31), an order was signed by Judge Caffey of the Southern District of New York, under date of November 20, 1936, for the issuance of a warrant to apprehend the defendant for alleged violation of one of the terms of his alleged probation (R. 32). He was arrested and bailed pending a hearing. *The petition failed to mention Judge Inch's order of December 16, 1935,* even though Probation Officer Sweet knew about it, having opposed the granting of that order. Judge Caffey does *not* appear to have had any knowledge of the December 16th order, when he granted his order for a warrant.

On December 1, 1936, a motion was made by the District Attorney of the Southern District of New York returnable December 8, 1936, for an order to re-settle the order of Judge Inch dated December 16, 1935.

It is to be observed that, though the notice of motion states that the motion is for an order "to set aside" (R. 35) the December 16th order of Judge Inch, that phrase must be read together with the prayer for relief in the motion itself, which merely asks for a *re-settlement and modification* of that order, and

> "that so much of the order of December 16, 1935 that purports to do more than discharge the defendant from probation supervision be set aside and *a new order entered in this cause*" (R. 39).

In other words, the government raised no questions to the propriety of Judge Inch's order—but merely sought to have its contents modified. On the hearing of that motion, the District Attorney specifically moved to *re-settle* the order, and did *not* seek to have it vacated (R. 59).

By stipulation, that motion was referred to Judge Inch, who, at the request of the Government, came over to the Southern District of New York, to hear the motion on December 8, 1936 (R. 42).

That motion was then heard by Judge Inch, the sentencing Judge, who then again sat and held court in the Southern District of New York (R. 42). He decided, after hearing both sides *on the merits,* that he would grant a *re-settlement* of the order, so as to insert the word "probation" into that part of the order which reads:

> "* * * and the proceedings against him under this cause, be and the same hereby are terminated",

so that it would read,

> "* * * and the *probation* proceedings against him under this cause, be and the same hereby are terminated" (R. 65).

The defendant (petitioner herein) took the position then, that the order could not be re-settled at this late date. Thereupon the District Attorney stated that he would "hold up

the entering of the order" of resettlement, "until such time as we find it necessary" (R. 65), and that he would not do so, anyhow, until after the court had disposed of the Writ of Habeas Corpus (R. 63).

So that the validity of Judge Inch's order of December 16, 1935, as an order in this proceeding, was recognized by the District Attorney of the Southern District of New York.

No order of resettlement was ever entered, so that the rights of the defendant on the Writ of Habeas Corpus, subsequently sued out by him, must be decided under the order of December 16, 1935 as it stands of record, entered and on file with the Clerk of the Southern District of New York.

On or about the 3rd of December, 1936, the Government gave notice to the defendant, and to his surety, that the indictments against him under C 96-120 and C 80-944 would be brought on for sentence on December 8, 1936 (R. 40, 41). But that notice was not pressed, and no application to sentence was ever made.

Then, on December 4, 1936, the defendant surrendered to the Marshall, under the order of Judge Caffey of November 20, 1936, charging the defendant with probation violation, and sued out a Writ of Habeas Corpus (R. 73), *on the ground that he could not be guilty of any probation violation by any act committed November 8, 1936* (R. 30) *in view of Judge Inch's order of December 16, 1935, which had discharged him from probation, and which had also "terminated the proceedings" against him* (R. 66-71). The return to that Writ was filed by John J. Kelly, Probation Officer, under date of December 8, 1936. A traverse to the return was filed by the defendant under date of December 10, 1936. Argument on the Writ came on before Judge Bondy on December 21, 1936 (R. 80).

The next day, the 22nd of December 1936, the United States Attorney served a notice of motion, returnable December 28, 1936, wherein he made the following prayer for relief, in regard to indictments C 96-120 and C 80-944 (R. 121):

"Wherefore, deponent prays that an order issue committing this defendant for the period of the *unserved portion* of his sentence of March 26, 1934, *to wit, four years,* in a place to be designated by the Attorney General of the United States, and for such other, further and different relief as to the court may seem just and proper." (Italics ours.)

The Decisions Below.

With regard to the motion to commit, it should be observed that *there had been no sentence imposed on these two indictments,* but that, on the contrary, "*the imposition* of sentence" had been suspended. So that no motion for an order to designate a place of incarceration for the purported "*unserved* portion of his sentence of March 26, 1934, to wit, four years," would lie. That motion was denied by the District Court (R. 132). *That is one of the orders involved on this appeal.*

In regard to the Writ of Habeas Corpus, the District Court held that, under *Title 18, U. S. C. Section 725,* the court could discharge the probationer not merely from further supervision, but could also terminate the proceedings against him in their entirety and give the defendant a full and complete discharge. Under that law, the order of Judge Inch of December 16, 1935 completely discharged the defendant, so that he was thereafter no longer amenable to any supervisory process of the courts in relation to those two indictments.

The District Court further held that, if the principle of *U. S.* v. *Greenhaus,* 85 Fed. 2, 116 (C. C. A. 2) applied to this case (on the ground that the sentences on all three indictments could be considered a single sentence, as they were heard and disposed of simultaneously, and that therefore the suspension of imposition of sentence and granting of probation on the last two indictments was illegal, in that it was coupled with a sentence on the first indictment for a prison term), the illegal provisions may be treated as a nullity. The District Court further held that no new sen-

tence could now be imposed, as the term of court, within which to resentence, had long expired, because a valid sentence was imposed with reference to all indictments, in that a valid sentence was imposed as to the first indictment, which sentence had been served and the fine paid by the defendant. In other words, if all three indictments are to be deemed a consolidated indictment, only one sentence could be imposed, and no re-sentence could be given after the sentence imposed had been served, and fine paid, even though part of the sentence then given may have been void.

The District Court, thereupon, held that the Government's motion to revoke the defendant's suspension of imposition of sentence, on the ground of violation of probation, should be denied, and it sustained the Writ of Habeas Corpus (R. 134). *That is the other order involved on this appeal.*

The Government appealed from those two orders, both of which were reversed by the Circuit Court of Appeals, which held that Judge Inch's order of December 16, 1935 was void because Judge Inch was not sitting in the Southern District of New York when he made that order.

Summary of Argument.

Under the provisions of *Section 725* of the *Probation Act*, the probationer may not only be discharged from the supervisory probation which was imposed by the trial judge when he suspended the imposition of sentence, but he may be fully discharged and the entire probationary proceedings terminated against him, so that he is thereafter no longer amenable to any supervision, or punishment either by reason of his conviction, or under the provisions of the Probation Act.

The section does *not* specify which Judge may make the order granting such relief. The trial judge has jurisdiction over the defendant *until actual imposition of sentence*. Here, *imposition* of sentence was *suspended* and the defendant placed upon probation. Therefore, the trial judge had continuing jurisdiction over the defendant until the defendant was either given a sentence or discharged. This is so even

where the trial judge was a visiting judge, and had returned to his own district after the termination of the trial term.

It may be true that a judge of the Southern District of New York also had such concurrent power to pass upon the granting of such an order. There is nothing, however, in the Probation Act which would bar the trial judge from such power, and the entire intent and purpose of the act indicates that the exercise of that power by the trial judge is preferable.

If there is a question of venue involved as to the proper place to make the motion, which was made at Chambers of the trial judge in the Eastern District of New York, on due notice to the Probation Officer of the Southern District of New York as required by *Section 725,* the question of venue should have been raised before the motion was argued on the merits. After argument on the merits and the decision, the question of venue, if involved at all, is deemed waived.

The venue question was not only waived by the Probation Officer, by arguing the application on the merits, but was subsequently waived by the United States District Attorney, when he argued a motion for re-settlement of the order which was entered on that application, and argued that motion on the merits in the Southern District of New York, before the same Judge, by stipulation.

As the defendant was fully discharged and all proceedings against him had been terminated, it was improper to thereafter charge him with an alleged violation of probation by an act *subsequently* committed, for there were no probation provisions then open for him to violate. The order for his arrest, for alleged probation violation, was therefore improperly granted, and the Writ of Habeas Corpus as to it was properly sustained in the District Court, and erroneously reversed in the Circuit Court of Appeals.

As the defendant had not had sentence imposed upon him on the other two indictments, but, on the contrary, the imposition of sentence having been suspended, there was *not* any purported "unserved portion" of the sentence to serve

for which a place of incarceration could have been designated by the Attorney General, so the motion to have such a place designated was properly denied by the District Court and erroneously reversed by the Circuit Court of Appeals.

If the principle of the *Greenhaus* case applies, that probation and a sentence for a term in prison cannot be concurrently imposed, then the sentence which was imposed, and which has been served and the fine paid, constitutes the full legal sentence and there may not now be a re-sentence for a longer term.

If, on the other hand, the principle of the *Greenhaus* case does not apply, then each of the dispositions on the several indictments was proper, and as the defendant was fully discharged by proper order, and the proceedings against him fully terminated by proper order, there was no probation violation which he could thereafter commit, and it was improper to thereafter apply for an order to bring the defendant in to submit to sentence.

Specifications of Errors.

1. The Circuit Court of Appeals erred in holding that the Probation Act, *Sections 724, 725, Title 18 U. S. C.*, provides for the execution of its provisions solely by the court in which the defendant pleads guilty or is convicted.

2. The Circuit Court of Appeals erred in holding that a District Judge, ordered by a senior Circuit Court Judge to hold court in another district, who there tries a case, suspending imposition of sentence and placing defendant on probation, is not empowered to sign an order as to probation in that case which the trial judge tried, when absent therefrom and sitting in another district.

3. The Circuit Court of Appeals erred in holding that the order of the trial Judge, which terminated the defendant's probation and terminated the proceedings against the de-

fendant, was void for lack of jurisdiction, because granted by him at Chambers when he was back in his home district after his visiting term was over.

4. The Circuit Court of Appeals erred in holding that the trial Judge, who had been a visiting Judge at the time of the trial and when the defendant came up for sentence and was placed on probation, and who was sitting in his home district when he entertained the application and decided the matter pertaining to probation which he had imposed, had no jurisdiction to pass upon that application.

5. The Circuit Court of Appeals erred in holding that neither the United States Attorney for the Southern District, nor the Probation Officer of the Southern District, had any right to act for the United States in the Eastern District of New York, in regard to *Sections 724* and *725* of *Title 18 U. S. C.*

6. The Circuit Court of Appeals erred in holding that the Government properly moved to revoke the probation and to sentence the defendant upon the second and third indictments, even though an order had been entered prior thereto discharging the defendant and terminating the proceedings against him.

7. The Circuit Court of Appeals erred in reversing the order entered in the District Court, which denied the Government's motion for an order committing the defendant to a penitentiary to be designated by the Attorney General of the United States, wherein the defendant should serve an "unserved portion" of a four year sentence under indictments C 96-120 and C 80-944 as to which imposition of sentence had been suspended, and no sentence ever imposed.

8. The Circuit Court of Appeals erred in reversing an order of the District Court, which sustained a Writ of Habeas Corpus, granted to the defendant, who had thereto-

fore been arrested under a warrant issued pursuant to an order of arrest of the defendant, for alleged violation of the terms of his probation.

9. The Circuit Court of Appeals erred in holding that under *Section 725*, the defendant could not be fully discharged and the proceedings against him fully terminated.

10. The Circuit Court of Appeals erred in holding that if the three indictments here, to which the defendant pleaded guilty at the same time, could be treated as if they were several counts in a single consolidated indictment, that the suspension of the imposition of sentence on two of the three indictments could be vacated and a larger sentence imposed and the enlarged sentence ordered, even though the sentence on the third indictment had been served and fine imposed paid.

POINT I.

The order of December 16, 1935 fully discharged the defendant and finally terminated the proceedings against him, under *Section 725* of the Probation Law.

Under *Section 725*, two types of probation are created, namely:

(a) *sentence probation*, under which a defendant is subject to probation supervision by Probation Officers during the time fixed for probation by the sentencing judge when he suspends the imposition of sentence, or suspends the execution on a sentence imposed, and

(b) *statutory probation*, under which the court has power, after the supervisory "sentence probation" period is ended, but within the maximum period for which the defendant might originally have been sentenced, to have

him brought in to court and to then impose such sentence upon the defendant as might originally have been imposed.

(See *Hollandsworth* v. *U. S.*, 34 Fed. [2] 423 p. 428 [C. C. A. 4; 1929]).

That section further gives the court the power to have the probationer brought in at any time while he is on probation, to investigate the facts of his probation, and then, the section says:

"* * * The court may thereupon discharge the probationer from further supervision *and may terminate the proceedings against him*, or may extend the probation, as shall seem advisable."*

It will be observed that under the above language of Section 725 the power is given to do the following things:

(a) "discharge the probationer from further supervision,"

(b) "terminate the proceedings against him,"

(c) "extend probation."

So that there is created by *Section 725* and, indeed, by the entire Probation Act, a proceeding which is apart from the Criminal proceeding, though appendant thereto, and which

* *Section 725* also has provisions for treating *probation violators*. It says that they may be brought in, either with or without a warrant, and then provides as follows:

"* * * thereupon the court may revoke the probation or the suspension of sentence and may impose any sentence which might originally have been imposed."

It was those provisions which this court considered in *Escoe* v. *Zerbst*, 295 U. S. 490.

These latter provisions, however, relate only to *probation violators*, and are distinguished and separated from the preceding provisions, which apply to probationers who are *not* violators.

At the time that the application in question was made for the order of December 16, 1935, *it is undisputed that the defendant was not a probation violator*. He, therefore, came within the first provisions quoted above.

may be treated as a separate thing,—namely, probation proceedings.

U. S. v. *Gargano,* 25 F. (2) 723, 724.

In the case at bar, the order in question reads as follows (R. 29):

> "ORDERED, that the order of probation made herein on the 26th day of March, 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is discharged from further supervision *and the proceedings against him in this cause be, and the same are hereby terminated.*"

The question now arises as to the meaning of the phrase of *Section 725* under which this order was drawn, which says that the order discharging the defendant *"may terminate the proceedings against him"*. Does this phrase mean merely the same thing as is expressed by that provision of the section which says that the "court may thereupon discharge the probationer from further supervision?" That would be redundancy, and the section will surely not be so construed.

Sutherland on Statutory Construction, 2nd Ed. Vol. II, Section 380, says:

> "It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of a statute (citing cases). Statutes should be so construed that effect may be given to all of their provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another" (citing cases).

Especially is that so here as the two phrases are connected by the word *"and"* which indicates that something was *added* by the latter provision.

What is the something that was added?

Surely the "proceedings", which the law says the court "may terminate" were *not* the mere supervision of the defendant, because that did *not* constitute a proceeding. There are only two proceedings involved, namely, the *criminal* proceedings and the *probation proceedings*. The criminal proceedings were still open, because no sentence had been imposed on the plea of guilty. *Burns* v. *U. S.*, 287 U. S. 216 (1932) (quoted *post* p. 31). There were also the probation proceedings pending, which is a continuing matter. *Burns* v. *U. S., supra,* page 219; *U. S.* v. *Antinori,* 59 F. (2) 171 (C. C. A. 5, 1932). The probation proceedings which were created by the Probation Act, are something separate and apart from the criminal proceedings, though appendant thereto (See *U. S.* v. *Gargano,* 25 F. (2) 723, p. 724). It is true that there are two kinds of probation under which a defendant could be held—either the *sentence probation* provisions of the trial judge's order, which also suspended the imposition of sentence, or else the *statutory probation,* which by *Section 725* followed the sentence probation period. But, as has been seen, *both* of these probations constitute parts of the *Probation Proceedings,* which were created by the Probation Act.

In *Burr* v. *U. S.*, 86 Fed. (2) 502, (C. C. A. 7, 1936) it was said, per *Briggle, J.*, (p. 503):

> "We know of no instance wherein the court may permanently suspend sentence or the imposition of sentence except by virtue of the terms of the Probation Act."

In *Kaplan* v. *Hecht, U. S. Marshal,* 24 Fed. (2nd) 664 (1928) the court states:

> "Hence the judge is given the power to suspend sentence—a thing he could not do without legislation, after the decision in Ex parte United States, 242 U. S. 27, 37 S. Ct. 72, 61 L. Ed. 129, L. R. A. 1917E, 1178, Ann. Cas. 1917B, 335. The purpose is to avoid imprisonment so long as the guilty man gives promise of reform.

> Clearly, therefore, probation is not intended to be the equivalent of imprisonment. The aim of the statute is reformatory, not punitive, and its language carries this aim into effect" (p. 665).

Clearly then, where *Section 725* gives the court power to "terminate the proceedings", if this power is not to terminate the criminal proceedings, *it is certainly the power to terminate the entire probation proceedings which were set up by the Probation Act.* Otherwise, if it merely meant to give the court power to terminate the supervisory sentence probation, it would be surplusage, and meaningless, because the section has already given the court the power to "discharge the probationer from further supervision", and this further clause is supposed to be an additional power which is preceded by the word *"and"*.

In the case at bar, the order of December 16, 1935, not only terminated the supervisory sentence probation, but went on to provide that

> "* * * the *proceedings* against the defendant in this cause be and the same are hereby *terminated.*"

That is the language of the statute.

If this sentence did not mean that the criminal proceedings were terminated, it certainly meant that the entire probation proceedings were terminated, because there were no other "proceedings" to be terminated.

It follows, therefore, that by the order of December 16, 1935, even as interpreted by the Government, there was a termination of the *statutory probation,* in addition to the termination of the supervisory *sentence probation,* and that the *entire probation proceedings* created by the *Probation Act* were terminated. By that order, under any construction, the defendant was discharged from any and every probation provision, and, thereafter, there could be no probation violation for which he could be held.

It follows, therefore, that the subsequent granting of the warrant for his arrest, for alleged subsequent probation vio-

lation, was improper, and that the Writ of Habeas Corpus was properly sustained in the District Court, and that this order should be reinstated.

In the two instances, where the pertinent provisions of *Section 725* have been passed upon, it has been squarely held that an order made after probation has begun which terminates "the proceedings", terminated the *entire* proceeding against the defendant and not merely the probationary supervision.

> *U. S.* v. *Antinori*, 59 F. (2) 171 (C. C. A. 5, 1932);
> *U. S.* v. *Maisel*, 26 F. (2) 275 (D. C., S. D. Texas 1928).

This would have been so, even if the order in the case at bar had been re-settled, to provide that it terminated "probation proceedings" (R. 63, 65), though it was not resettled.

In the *Maisel* case, *supra*, the defendant, after being convicted, was given a suspended sentence, and placed on probation for a two year period. At the end of the two year period, *when his probation period was over*, he made an application to the court to have the proceedings against him terminated. In view of the fact that he had already served his complete period of probation, his application could have had no significance, unless its purpose was to relieve him from something which was not included in the sentence probation itself. This additional something, obviously, was the criminal proceedings itself, and any possible further control that the court might have over him beyond the probation period fixed by the trial court, but during the statutory probation period.

In granting that application, the court said per *Hutcheson, J.* (p. 276):

> "The statute under review is drawn so as to confer upon and invoke the exercise *by the sitting judge* of, in the doing of justice, the broadest equitable power in the light of the facts elicited and to be elicited as to the particular defendant, *both at the time of trial and dur-*

> *ing his period of suspension,* to the end that, if it appear that the ends of justice and the interests of the public and of the defendant require, not only that the defendant be unconfined, but that he may redeem himself during the period of his probation so fully *as to have the judge, under the statute, discharge the proceedings against him.* * * * the interests of the public and of the defendant alike, are subserved by *fully discharging the proceedings against the prisoner;* and it will be so ordered." (Italics ours.)

This case has been commented on and its holding approved in *23 Illinois Law Review 832* and in *7 Texas Law Review 161.*

The Government in its brief below, admitted that in the *Maisel* case, the defendant received "a full and complete discharge" (p. 25).

The claim was made, however, by the Government, in its brief below (pp. 24-25), that the *Maisel* case did not show the nature of the crime, nor the length of time for which the defendant could have been convicted, and that, therefore, the decision there rendered was innocuous. It is obvious, though, that if the possible sentence for the crime committed had not been beyond two years, there was no need or purpose for making the application to have the proceedings terminated, because the probation itself covered the two years period, so that as a matter of law, the proceedings had terminated of their own accord. *That order, obviously, relieved the defendant from something that hung over him beyond the two year probation period,* and that went into the "statutory probation" period.

It is perfectly obvious that the facts in the *Maisel* case, *supra,* resembled the facts in the case at bar, so that the decision there rendered is here applicable.

In *U. S.* v. *Antinori, supra,* the court made a lengthy and careful study of *Section 125,* and held that the Probation Act was remedial, and then made this significant observation (p. 172):

"As is well expressed in the act itself, the law is designed to vest the *trial judges* with discretion to extend mercy to the defendant when the ends of justice and the best interests of the defendant and the general public would be subserved thereby. The act gives the trial court authority to suspend either the imposition or execution of sentence and to place the defendant upon probation upon conditions. If, in a shorter time than provided by the order, it should appear that the defendant has rehabilitated himself and become a useful citizen, *the court may terminate the proceedings against him.*

* * * * * * *

There could be no doubt, both by the letter and intent of the Probation Act, that jurisdiction of the court is continued after the term over a case in which the sentence is suspended, *for the purpose of terminating the proceedings and discharging the defendant* or setting aside the probation and reinstating the original sentence.

* * * * * * *

Assuredly Congress could provide by statute for the retention of jurisdiction beyond the trial term for that purpose, and could also provide that the sentence might be reduced. We think that in enacting the Probation Act Congress has done so." (Italics ours.)

Then comes a further, even more signicant part of the opinion, for the court then says (p. 172):

"Suspension of sentence * * * implies that the jurisdiction of the court over the case and over the defendant is continued until the suspension of sentence is terminated, either by the *final discharge* of the defendant or by the imposition of punishment." (Italics ours.)

In the case at bar, the defendant was given a *"final* discharge," when "the proceedings" against him were "terminated."

The courts have said that the Federal Probation Act must be construed in the same liberal way that the State Courts have interpreted the State Probation Acts.

In *Ackerson* v. *U. S.*, 15 F. (2) 268 (C. C. A. 2; 926) the court said:

> "Congress * * * framed a statute along the lines of the 'probation acts' now well known in a considerable number of states. It seems to us a reasonable conclusion that since this statute is not pioneer, Congress expected and intended that it should receive at the hands of the courts the same distinctly benevolent interpretation that most of the state tribunals have accorded to the probation acts of their several states."

See also

U. S. v. *Antinori*, 59 F. (2) 171;
Kaplan v. *Hecht*, 24 F. (2) 664, 665.

With this thought in mind, the decision in the case of *Marks* v. *Wentworth*, 199 Mass. 44 (1908) assumes much importance in determining the effect of the phrase "terminate the proceedings", since "the American system of probation, * * * originated in Boston, Mass., in 1869 * * *" *U. S.* v. *Maisel* (*supra*) page 276, and the *Marks* case is an adjudication of a portion of the Massachusetts Probation Act which is directly in point here.

In the *Marks* case, the defendant was placed upon probation and imposition of sentence was continued. The defendant eventually brought a mandamus action to compel the Trial Judge to impose a sentence upon him or to dispose of the case. The Trial Judge had stated that he thought the only disposition that he could make of the case was to put it "on file", which, in effect, meant to continue the probation indefinitely. In granting the Writ of Mandamus, the court said that the trial judge had power to dispose of the case by not only freeing the defendant from any further probationary supervision, but by *completely dismissing the case.* The court said, per *Knowlton, C. J.* (p. 46):

> "* * * If for any reason the Judge would think it better, in the interest of law and justice, to dismiss the case rather than to place it on file, we are of the opinion that the statutes give him authority so to do."

It also said (p. 46):

> "Although the statute does not say in terms that if, after a season of probation, the object of the probation seems to the court to have been accomplished, in such a way as not to require any punishment of the defendant, either for his own reformation or in the interests of the public, *the court may finally dispose of the case by a dismissal of it*, we think this logically follows from the principles which lie at the foundation of the legislation, and from the general provisions which seem to leave the whole matter in the control of the court. * * * *We are of opinion that the large discretion that is given to a court, in such cases includes jurisdiction to dismiss the prosecution, and finally discharge the defendant after a period of probation, if that seems best.* (Italics ours.)

The Massachusetts Act did *not* specifically give the Court or Judge the power to discharge the defendant or to terminate the proceedings against him. Yet, in the *Marks* case, it was held that under that Probation Act, the defendant could be given a full discharge and the proceedings against him completely terminated. This was as early as 1908. The *Federal Probation Act,* which was enacted in 1925, *does* contain such express provisions in *Section 725.* As the Federal law was enacted with the decisions of the States courts on that subject in the minds of the legislators, it would seem that the decision made in the *Marks* case has an *a fortiori* application under the broader provisions of the Federal Probation Act.

So that, under *Section 725,* an order may be entered, "fully discharging the proceedings against the prisoner," (*Maisel* case, *supra*), and such an order constitutes "the *final* discharge of the defendant" (*U. S.* v. *Antinori, supra*).

Thereafter, the jurisdiction of the court over the case and over the defendant was at an end. So that there could not be, and is not any proceeding pending, or probation provision in existence, which the defendant might thereafter have violated.

It follows, that the warrant of arrest of the defendant, for allegedly having thereafter violated probation was erroneously granted.

Judge Caffey, in granting the order for the warrant, had not been informed of the existence of the order of December 16, 1935. Otherwise, it is fair to assume, he would not have ignored that order, and would not have granted the order for the warrant.

In any event, the warrant having been wrongfully issued, the Writ of Habeas Corpus, releasing the defendant therefrom, was properly sustained by the District Court, and should be reinstated.

POINT II.

Until sentence or discharge of the defendant, the Trial Judge's jurisdiction continues over him, even at a subsequent term, and even though the Trial Judge was a visiting judge who has, in the meantime, returned to his own district; particularly so under the provisions of the Probation Act. Judge Inch, therefor, had the power to make the order of December 16, 1935.

Did Judge Inch have the power to make the order of December 16, 1935, which related to defendant's probation?

In this connection, it is important to observe the relationship that exists between probation and sentence. The imposition of sentence could not have been suspended for a prolonged period, except under the provisions of the Probation Act, and all further steps thereafter, as to sentence in that criminal proceeding, can be taken only under and by virtue of the provisions of that Act. So that, though probation is not part of a sentence, it is appendant to and part of the sentencing power.

Therefore, if, after the Trial Term had expired Judge Inch had jurisdiction in relation to the sentence of the defendant, it would follow that he had the jurisdiction and the power to make orders of a probationary nature, which would discharge the defendant and terminate the proceedings against him.

That the jurisdiction of the *Trial Judge* extends over the defendant until either sentence is imposed, or until the defendant is discharged, is settled by a line of decisions.

Rachmil v. *U. S.*, 288 Fed. 782 (C. C. A. 2; 1923), Cert. Denied, 262 U. S. 751; 43 Sup. Ct. 700;
State v. *Stevenson*, 64 W. Va., 392, 62 S. E. 688 (1908);
Shore v. *Splean*, 258 Fed. 150 (C. C. A. Dist. of Columbia; 1919);
Ex Parte De Angelo, 50 F. (2) 847, (C. C. A. 6; 1931);
U. S. v. *Garsson*, 291 Fed. 646, (D. C. S. D. N. Y.; 1923);
Rosenwinkel v. *Hall*, 61 F. (2) 724 (C. C. A. 7; 1932);

The jurisdiction of the Trial Judge was broadened by the Probation Act.

In *Mouse* v. *U. S.*, 14 Fed. (2d) 202, the Court said, per Pollock, J. (p. 203):

> "The general rule is, after the term at which a case has been finally determined and ended by final judgment or decree has fully expired and ended, the court loses all jurisdiction and power over its judgment or decree. The probation act above quoted must have been by Congress enacted with this general rule in view. Now the act as above quoted is seen to provide for the probation of one convicted or pleading guilty before sentence is imposed, by suspending the imposition of sentence, and also by suspending the execution of a sentence imposed."

So that until sentence or discharge, the Trial Judge has jurisdiction over the defendant as a part of the Probation Act.

So too, a visiting Trial Judge, even after he returns to his home district, carries with him jurisdiction over the defendant until the defendant is sentenced or discharged.

Title 28, U. S. C. Section 22, (enacted in 1911 and amended in 1913 and 1922), gives a visiting Judge, after he has returned to his own district,

> "* * * the power to decide *all matters* which have been submitted to him within such (visited) district."

Section 23 supplements *Section 22.* That the provisions of *Section 22* apply to visiting district judges is settled. *Hicks v. U. S. Shipping Board,* 14 F. (2) 316 (1926).

That the matter of sentencing the defendant is one of those *"matters"* which adhere to the visiting judge, when he returns to his home district, was squarely decided in *Rachmil* v. *U. S., supra,* and in *U. S.* v. *Garsson, supra.*

In other words, the trial judge's jurisdiction continues over defendant until sentence or discharge, whether the trial judge is a resident judge or a visiting judge.

In the *Rachmil* case, *supra,* which arose right after *Section 22* went into effect, a judge of the Western District of Pennsylvania was assigned temporarily to sit in the Southern District of New York. While he was so sitting, the defendant came on for trial on the charge of evading income tax payment, and was found guilty by a jury. The imposition of sentence was postponed, pending the making of motions for a new trial, and the study of the case and of the defendant's record by the authorities and by the Trial Judge. The trial term thereafter expired and the Trial Judge returned to his own district in Pennsylvania. At a subsequent term, the Pennsylvania Judge returned to the Southern District of New York for the purpose of imposing sentence on the defendant, and did so. The defendant attacked the sentence on the ground, among others, that the Pennsylvania Judge had

lost all jurisdiction over the defendant after the expiration of the Trial Term and after his return to his own district.

The Circuit Court of Appeals for the Second Circuit, however, held that *the Trial Judge had continuing jurisdiction* over the defendant after conviction up to the time of sentence, saying, per *Manton, C. J.* (p. 785):

> "The District Judge who presided at this trial, after the verdict of conviction, returned to his own district (the Western District of Pennsylvania), and later returned to the Southern District of New York before the entry of the judgment. This became necessary because of the delay between the motion of the defendants to set aside the verdict, the submission of briefs, and the study of the case by the trial judge. When he returned, he imposed sentence. *The imposition of such sentence was the completion of* **unfinished business** *which arose during the term for which he was assigned to sit in the Southern District of New York.* The prosecution was not complete until the entry of the judgment. The court has the power to finish at a succeeding term the business begun at a previous term. *Walker* v. *Moser,* 117 Fed. 230, 54 C. C. A. 262. A District Judge who tried the case is compelled to impose sentence after the jury's verdict finding guilt. *Ex Parte U. S.,* 242 U. S. 27, 37 Sup. Ct. 72, 61 L. Ed. 129, L. R. A. 1917 E. 1178, Ann. Cas. 1917 B, 355. The court does not lose jurisdiction of the case in the meantime. *Miner* v. *United States,* 244 Fed. 422, 157 C. C. A. 48, 3 A. L. R. 995." (Italics Ours)

In the *Shore* case, *supra,* a sitting Judge in the Police Court became ill. Pursuant to statute, the Chief Justice of the Supreme Court appointed Judge McMahon, a Municipal Court Judge, to fill the vacancy caused by the regular Police Judge's illness. A defendant was tried before him and found guilty. When the time came for Judge McMahon to sentence the defendant, the two regular police Judges were in court discharging their duties. The defendant Shore contended that Judge McMahon's power terminated as soon as the regular Police Judge commenced his regular duties, and that, therefore, the sentence imposed by Judge McMahon

was invalid. This contention was dismissed, however, the court holding, per *Smythe, C. J.* (p. 152):

> "It was undoubtedly the intention of Congress to provide for a temporary judge, that he should perform the duties of the position during his incumbancy *and complete any work entered upon him before he withdrew from the case.*"

In other words, the substance of the above case was that the jurisdiction of a temporarily assigned Judge continues until the defendant is sentenced or discharged.

In *Ex Parte De Angelo, supra,* the appellant had pleaded guilty. Sentence was deferred, and, four terms later, the defendant was sentenced. It was contended that the sentence was invalid, because the Court had postponed sentence indefinitely, and that, several terms of court having expired, jurisdiction to impose any sentence had been lost. This contention was rejected, the court saying, per *Simmons, J.* (p. 848):

> "When the appellant's sentence was postponed the Federal Probation Law was in force. * * * Granted that in the instant case the sentencing judge did not specifically indicate that the postponement of sentence was a suspension of its imposition under the Probation Law. We are dealing with the question of judicial power. If what the court did, by whatever name it may be called, operated as a suspension of the imposition of sentence, it was clearly within the power of the court to do it."

In the *Rosenwinkel* v. *Hall* case, *supra,* the defendant made the point that the court was without jurisdiction to impose sentence, because an entire term of court had elapsed between the term at which he pleaded guilty and the term at which he was sentenced. But this contention was rejected, the court saying, per *Evans, J.* (p. 725):

> "That the *Trial Judge* in the instant case stayed the sentence, not to give the accused an absolute remission of all penalty, but to enable the court to better satisfy

its own mind what the punishment should be, is the necessary and logical inference deducible from the record before us. This being the situation, it follows that the court was acting within its power, unless the fact that it failed to pronounce the sentence within the term divested it of all power to do so later." (Italics ours.)

The court then went on to say (p. 726):

"Convinced as we are that the statute above quoted (Probation Act) is one for the benefit of the accused, such benefit to be obtained through an enlargement of the powers *of the court imposing a sentence in a criminal case,* we follow *Ex Parte De Angelo, supra,* and hold that *the court that tried appellant had the power, at a subsequent term, to sentence him.*" (Italics ours).

In that connection, it was well said in *Ackerson* v. *U. S.*, 15 F. (2) 268 (C. C. A. 2; 1926); per *Hough, J.* (270):

"The power of suspension is lodged in the court, and any acting judge constitute a District Court."

Though that case refers to resident district judges, the same rule would apply to visiting district judges. *Rachmil* v. *U. S., supra.*

In *U. S.* v. *Garsson, supra,* Judge Foster was designated to sit during the period beginning September 1, 1922 and ending November 1, 1922. On November 1, 1922, certain defendants were being tried. Their co-defendants had pleaded not guilty, and had not been sentenced. On November 21st, the jury brought in a verdict of acquittal as to those defendants who were on trial. On the 22nd, Judge Foster allowed those defendants who had pleaded guilty, to withdraw their pleas and plead not guilty. The court said, per *Learned Hand, J.* (p. 648):

"Judge Foster's unfinished business at least did not terminate with the acquittal of those who stood trial. The (Trial) Judge had yet to dispose of those who had pleaded guilty, presumably by a sentence. * * * I think

that his appointment must have been understood to cover all routine *matters*, of which this was one, * * * and that he was authorized to finish anything so arising after having once taken jurisdiction over it." (Italics ours.)

In other words, the above case again illustrates the proposition that a Trial Judge does not lose jurisdiction over a defendant, despite the fact that the time of his visiting commission had expired, until the defendant is either sentenced or discharged.

So that, as has been seen from the foregoing cases, the jurisdiction of the Trial Judge over the defendant continues even at a term subsequent to the one at which the defendant was tried or pleaded guilty, or even subsequent to the term when a visiting judge returns to his own district.

Several of the foregoing cases were decided *before* the Probation Act went into effect. At that time, the court could extend the period for fixing sentence for a given reason, *but not indefinitely. Ex Parte U. S.*, 242 U. S. 27; *U. S.* v. *Murray*, 275 U. S. 347. As was stated in *Ex Parte Singer*, 284 F. 60 (C. C. A. 3; 1922), per *Wooley, J.* (pp. 62-63):

"As to the power of a court to suspend sentence in given circumstances, there can be no doubt. Certainly, it is competent for a court temporarily to suspend its judgment, and to continue to do so from time to time, and indeed from term to term, in a criminal cause for the purpose of hearing and determining motions and other proceedings which may occur after verdict and which may properly be considered before judgment; also to gain information that will lead to a just sentence * * * and, in fact, 'for any legitimate purpose', or 'good and valid reason'.

* * * * * * * * *

"when (in the absence of statute or accepted practice) a court postpones sentence silently, that is, without an indication of a lawful purpose, it in effect postpones sentence indefinitely. The weight of authority is that when a court has, without valid reason and quite

> indefinitely, postponed the pronouncement of sentence, it cannot at a subsequent term proceed to judgment by imposing sentence."

The necessary statutory authority for a Trial Judge to indefinitely extend the sentence, which was referred to in the *Singer* case, was supplied by the subsequently created *Probation Act.*

Indeed, in the case of *Ex Parte De Angelo,* the court expressly says (p. 848):

> "The decisions in the *Singer* Case * * * and others were predicated upon the absence of a statute conferring upon courts the power to suspend sentence. We now have the statute (referring to the Probation Act)."

The rule was, therefore, established by statute that the trial judge continues to have the jurisdiction over the defendant until his sentence or discharge.

In the case of *Burns* v. *U. S.*, 287 U. S. 216, it was held, per *Hughes, C. J.*, (p. 222):

> "He is still a person convicted of an offense, and the suspension of his sentence remains within the control of the Court. The continuance of that control, apparent from the terms of the statute, is essential to the accomplishment of the beneficient purpose, as otherwise probation might be more reluctantly granted, or when granted, might be made the occasion of delays and obstruction which would bring reproach upon the administration of justice (citing cases)."

That the Trial Judge is empowered with jurisdiction over the defendant after the trial term and during the probation period and up to the actual sentence or discharge, is decided in *U. S.* v. *Maisel,* 26 F. (2) 275, (quoted *supra,* p. 20), and also in *U. S.* v. *Antinori,* 59 F. (2) 171 (C. C. A. 5; 1932) (quoted *supra,* p. 22).

It may, of course, be true that the Trial Judge shares concurrent power with a subsequently sitting Judge of the Trial Court in finally sentencing or discharging the defendant.

But there is nothing in the Probation Act which deprives the actual trial judge of the jurisdiction he has over the defendant until sentence or discharge; indeed, on the contrary, as has been seen, that act enlarges his jurisdiction over the defendant.

In *Ackerson* v. *U. S.*, 15 F. (2) 268, 1926 (C. C. A. 2), the Court said, per *Hough, Ch. J.* (p. 270):

> "There is nothing specifically said in the Statute to prevent a convict from selecting some particular Judge before whom to prefer his plea for mercy, and nothing positive to prevent him making the round of all the Judges who may help the court of original jurisdiction in which he was convicted, and much less does the statute in terms cover cases (such as are shown above) of death or *removal* (of the trial judge) *from district.*" (Italics ours.)

From the foregoing, it may properly be said that one of the *"matters"* which were submitted to Judge Inch as one of the incidents of the case before him, was the sentencing of the defendant. Judge Inch did not sentence the defendant while he remained in the Southern District. This was, therefore, part of the

> *"unfinished business* which arose during the term for which he was assigned to sit in the Southern District Court" (*Rachmil* v. *U. S., supra*).

Where a Judge has not imposed sentence, jurisdiction of the Trial Judge over the defendant continues until sentence or discharge of the defendant. This rule applies also to the Trial Judge who was a visiting judge at the time of the trial, and who has since returned to his own district, because, by the provisions of *Section 22 of Title 28, U. S. C.*, a visiting judge, after he has returned to his own district, has

> "* * * the power to decide *all matters* which have been submitted to him in the (visited) district".

POINT III.

The Probation Act did not designate the specific judge who should pass upon the application for discharge of the probationer or termination of the proceedings, but left it open.

The Trial Judge is generally the preferable judge to pass upon such relief, even though a sitting judge of the court might also do so.

Not only did the Probation Act extend the Trial Judge's *judicial* jurisdiction over a guilty defendant as a subsequent term (See Point II, *supra*, p. 25), that Act also added to the Trial Judge's jurisdiction over the defendant by vesting in him a *quasi-administrative* function, namely, the supervision of the defendant's probation. By the very wording of the Act, the trial courts may.

> " * * * suspend the imposition or execution of sentence and place the defendant upon probation for such period as they deem best; * * *"

And in *Ackerson* v. *U. S.*, 15 F. (2) 268, 270, it was said:

> "The power of suspension is lodged in the court and any acting judge constitutes a District Court."

This obviously refers to the Trial Judge because he is the judge who is suspending the sentence.

That the Trial Judge may act under the provisions of *Section 725* of the *Probation Act* appears from a study of that section. It is important to observe that it contains two distinct sets of provisions relating to two distinct types of judicial acts, to be performed:

> (a) Provisions giving the court power to *discharge* the probationer from further probation supervision and to "*terminate* the proceedings against him" or to extend the probation, and

(b) Provisions as to probation violators giving the court power to *revoke* probation and to revoke the suspension of sentence and to impose such sentence as might originally have been imposed. (In the case at bar, the defendant was *not* a probation violator at the time the application for the order of December 16, 1935 was made and granted.)

Significantly, the section does *not* designate the particular court which may hear the application relating to *discharge* of the probationer and for *termination* of the proceedings. *That has been left open.*

Section 725, U. S. Code Title 18, states:

"When directed by *the court,* the probation officer shall report to *the court* with a statement of the conduct of the probationer while on probation. *The court* may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation as shall seem advisable" (italics ours).

That the specific court which was to act was left open by design would appear from a consideration of the Act's provisions relating to revocation.

In regard to revocation of probation as to probation violators, the section makes a distinction between probation violators who are arrested by warrant for probation violation, and those who are arrested without a warrant, and specifies that *probation violators, who are arrested by warrant,* should be taken before *the court which issued the warrant, and still further provides that the warrant in such a case is to be issued only out of the sentencing court* (*Escoe* v. *Zerbst,* 295 U. S. 490). The section, however, does *not* specify the court to which a probation violator shall be taken, when he has been arrested *without a warrant,* though it does provide that he may be arrested without a warrant *"wherever found".*

It is, therefore, significant to observe, that the Act specifies the particular court which may hear the application in only

one set of circumstances, namely, as to a probation violator who has been arrested by warrant, and has left open the court as to all other provisions in the section. This flexibility of the section, as to all other provisions thereunder, has been recognized by the Circuit Court of Appeals for the Second Circuit itself.

In *Ackerson* v. *U. S.*, 15 F. (2) 268 (C. C. A. 2, 1936), the court said, that the Probation Act left the situation presented by the case at bar open. (See quotation, *supra*, p. 32).

The framers of the Probation Act thus appear to have deliberately left open to the probationer the right to apply to the Trial Judge in a situation like the one at bar, for an order discharging him and terminating the proceedings against him. It may be that, after the trial term is over, a subsequently sitting judge of the Trial Court shares concurrently with the Trial Judge, the quasi-administrative power of administering probation. If that is so, the Trial Judge may in his discretion either act on that application, or else, he may send the probationer and his application to the then sitting judge of the Trial Court. Indeed, where a probationer wishes to make application for an order discharging him and terminating the proceedings, he may either apply to any sitting judge of the Trial Court, or he may apply to the Trial Judge himself, even though that judge is sitting as a court in some other district. (See *Ackerson* case, quoted, *supra*, p. 32.)

In granting to the probationer the benefits especially created for him, the Probation Act must be liberally construed.

> "To accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential. It is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion. The provisions of the Act are adapted to this end." (*Burns* v. *U. S.*, 287 U. S. 216, *per Hughes, C. J.*, p. 220.)

The *Probation Act* (*Section 725*), specifies that "The Court" may discharge the probationer. Regardless of whether this be interpreted to mean any federal court "having original jurisdiction of criminal actions," or only the sentencing court, the fact remains *that Judge Inch was acting as a court,* when he did act.

The fact that he was the Trial Judge of the case at bar, would permit him to so act, even though he were then sitting as a judge of the court of the Eastern District. Particularly as the Probation Act is to be liberally construed in favor of probationers.

That the *Probation Act* was enacted "for the benefit of the accused" has been repeated so often by the court that it requires no extensive citation in support of the proposition. *Rosenwinkel* v. *Hall,* 61 F. (2) 724, 726 (C. C. A. 7; 1932).

In the *Rosenwinkel* case, *supra,* the court added (p. 726):

> "Its object being human and benevolent, the statute (the Probation Act) should be given a broad interpretation."

In *Nix* v. *James, 7 F. (2) 590, page 593, it* was there also said:

> "In view of the liberal construction to which the statute is entitled, we cannot read into it a limitation on the power granted not written there by Congress."

Moreover, *Title 28, Section 22* of the *Judicial Act, states:*

> "Any designated and assigned judge who has held court in another district than his own shall have power, notwithstanding his absence from such district and the expiration of the time limit in his designation, to decide *all "matters"* which have been submitted to him within such (visited) district * * *." (Italics and quotes ours.)

So that Judge Inch was actually acting as a court for the Southern District within the jurisdiction he had over the defendant until sentence, and as a supplement to that jurisdiction.

The suspension of the imposition of sentence and the placing of the probationer on probation was one of the *"matters"* which was submitted to Judge Inch while sitting in the Southern District of New York. Probation was the reason why the imposition of sentence was meanwhile suspended by the Trial Judge. This is part of the Trial Judge's *"unfinished business"* (See *Rachmil* case quoted, *supra,* p. 27).

Since the courts have, time after time, repeated the proposition that the Probation Act must be liberally construed so that the probationer will obtain its full benefits, the case at bar presents an appropriate instance where that liberal interpretation should be applied. Especially so, when the Trial Judge's intimate relationship with the probation of the defendant is considered.

The theory of probation is that the court is attempting to work out the reformation of the defendant. In the report of The Advisory Committee on Penal Institutions, Probation and Parole (1931) it is said,

> "Fundamentally, probation is now regarded in this country as a judicial function as a mere extension of the authority of the Judge to whom the probation officer is responsible and who really, in theory, controls the treatment that is called probation." (Vol. III, p. 204 of National Committee on Law Observance and Enforcement Reports.)

Who would be in the best position to deal with the prisoner on the basis of a fuller acquaintanceship, the Judge who tried the case, or a new Judge? Obviously, the Judge who originally tried the case and granted the probation and suspended the imposition of sentence. The Trial Judge would be interested, step by step, in the reformation of the defendant. Unnecessary formalities should not stand in the way of permitting the Trial Judge, who originally placed the defendant *on probation*, to keep up the individualization of the reformation.

Especially is this important when the probationer applies for an order discharging him and terminating the proceed-

ings against him. The mere fact that the Judge who heard the case and placed the defendant on probation is thereafter sitting in some other district, should not preclude the probationer from applying to that judge for a valid order of discharge. It is to the probationer's advantage, in view of the Trial Judge's familiarity with the case, to come before that judge, rather than some other judge, who would be unfamiliar with the status of his case and the progress of his reformation, especially in cases where the imposition of sentence has been suspended.

Nor does the Probation Act take away that power from the Trial Judge, even though he be in another district.

In *Riggs* v. *U. S.*, 14 F. (2) 5, (C. C. A. 4; 1926), (Cert. denied, 273 U. S. 719), the court said, per *Waddill, J.* (p. 9):

> "In the enforcement of this act much latitude must be allowed to the *district judge,* in affording the defendant the benefits thereof."

Later on in the opinion the court refers to "the judge holding *the court which* granted probation" as having continuing power over the probationer. This obviously alludes to the Trial Judge.

In the *Antinori* case, *supra,* the Court said, page 172:

> "* * * the law is designed to vest the *trial judges* with discretion. * * *"

In *Ex Parte De Angelo,* 50 F. (2) 847 (C. C. A. 6; 1931) the court said, per *Simons J.* (p. 848):

> "The Courts of Appeal of the Eighth and the Fourth Circuits have held that much latitude is allowed *District Judges* in enforcement of the Probation Act. *Reeves* v. *United States,* 35 F. (2) 323; *Riggs* v. *U. S.,* 14 F. (2) 5."

In *Jianole* v. *U. S.,* 58 F. (2) 115 (C. C. A. 8; 1932), the court said, per *Van Valkenburgh, Ch. J.* (p. 117):

> "Everything points to the purpose of the Congress to lodge a very broad discretion in the *trial judge* in the granting and revoking of probation. To require formal proceedings would be subversive of the very purpose of the act." (Italics ours.)

See also to identical effect, *U. S.* v. *Maisel*, 26 F. (2) 275, (D. C. S. D. Texas 1928) (quoted, *supra*, p. 20).

This court has laid down a guiding principle in *Burns* v. *U. S.*, 287 U. S. 216 (p. 220) (quoted *supra*, p. 35).

From the foregoing, it can be seen that both by law and by reason, the Trial Judge is the judge best fitted to determine matters arising out of the defendant's probation.

In the light of the repeated statements by the courts that the Probation Act must be liberally construed so that the probationer derives every possible legitimate advantage from it, it is respectfully urged that this court construe the Act so that it be settled beyond question, that the Trial Judge, even though he be sitting in another district, has jurisdiction to discharge the probationer from supervision and terminate the proceedings.

POINT IV.

Any venue objection that might have been raised to Judge Inch hearing the motion in his home district was waived by the government on two occasions: (1) when the motion was originally argued on its merits (R. 50, 51, 83), and (2) when the government moved to re-settle the order (R. 39).

Under *Section 725*, the only person who need be notified about the application for discharge of a defendant and for termination of the proceedings against him is the proper probation officer. In this case, he was the Probation Officer for the Southern District of New York. Here, the probation

officer for the Southern District of New York was given "due notice" of the application (R. 29), and he appeared before the Judge on the hearing, and argued on the merits against the granting of the application (R. 50, 51, 83).

Thereafter, the District Attorney for the Southern District of New York moved for re-settlement of that order (R. 39) and that motion by stipulation was heard by the Trial Judge, who was then again sitting in the Southern District. That motion was argued *on the merits,* and on that argument the District Attorney supplemented his original motion by a modified oral motion for a mere *re-settlement* of that order (R. 59). On that hearing, *the validity of the order as a proper order in the case was accepted by the District Attorney,* who said he would not even re-settle the order, (in accordance with the suggestion of the Judge that he would grant a re-settlement to insert the word "probation" ahead of the word "proceeding" so as to indicate that he meant to terminate "the probation proceedings") *"until such time as we find it necessary"* (R. 65).

Jurisdiction to hear matters of a probationary nature is given to "courts of the United States having original jurisdiction of criminal actions". (Probation Act, Sec. 724). Therefore, since Judge Inch was sitting as a Federal District Court, either of the Eastern District or the Southern District of New York, when he made the order of December 16, 1935, discharging the probationer and terminating the proceedings, there is no doubt that he did have jurisdiction over the general subject matter of probation.

Jurisdiction of the subject matter is derived by law and cannot be acquired by consent of the parties. *Egan* v. *Knewel,* 298 F. 784, revd. on other grounds 268 U. S. 442; *Wick* v. *U. S.,* 290 F. 191.

But where the court has jurisdiction over the subject matter, the parties may waive improper venue.

The distinction between jurisdiction and venue has been clearly stated in *Fribourg* v. *Pullman Co.,* 176 F. 981, where the Court quoting from Street on Federal Equity Practice, Vol. I, Secs. 383-384, said, per *Connor, J.* (p. 984):

> "If a suit is of such a nature that it can certainly be brought in some federal court, or another—that is, if the subject matter of the suit, or the character of the parties, is such that a federal court of some state or district has jurisdiction to entertain it—then the question whether that suit should be brought in one particular state, or district, rather than in another, is not a question of jurisdiction at all. It is rather a question of venue * * * The venue is a matter of personal privilege and can therefore be waived * * *"

It is well settled that failure to challenge jurisdiction of the person, or appearance, is equivalent to consent. *Chapman* v. *Scott,* 10 F. (2) 156; Affd. 10 F. (2) 690; Cert. Denied 270 U. S. 657. *Panama Ry. Co.* v. *Johnson,* 289 F. 694 Affd. 264 U. S. 375.

When the Probation Officer appeared before Judge Inch to argue against the granting of the application on its merits, and again when the District Attorney subsequently moved to resettle the order of Judge Inch discharging the probationer, each of those appearances gave to Judge Inch jurisdiction over the parties. *Therefore, since* he already had jurisdiction over the subject matter (*Sec. 724 Probation Act*), the order of discharge and termination of proceedings was a valid and effective one.

In the instant case, there is, of course, no question but that all the facts were known to the probation officer, as well as to the United States District Attorney and neither of them made any objection to Judge Inch's jurisdiction at any time.

That a United States District Attorney may waive venue is settled in *Atkins* v. *Bender,* 18 F. (2) 357. In that case an action was instituted against the collector of Internal Revenue in the Western District of Louisiana. It should have been brought in the Eastern District, the domicile of the collector. The District Attorney had made a motion extending his time to answer and it was granted. Subsequently, the District Attorney moved for dismissal of the action on

the ground that the Court of the Western District had no jurisdiction over the action. The defendant claimed that since the duty of the District Attorney was imposed by statute, he had no right to waive venue. The court said, per *Dawkins, J.* (p. 358):

> "The * * * question is more properly speaking one of venue, for undoubtedly a federal court has jurisdiction to decide such matters. If timely urged, the defendant had the right to require that the suit be brought at his domicile; but this, in my opinion, was a privilege which he might waive, the same as any other defendant sued in a personal action."

In the case of *U. S.* v. *Goldstein*, 271 F. 238, (C. C. A. 8); 1921) the same problem arose, and again the court held that venue could be waived.

Finally, in the case of *Cheeseman* v. *Hart*, 42 F. 98, a case very close to the one at bar, insofar as it involved a visiting judge who returned to his own district, and then heard a further motion in the case, it was held that any jurisdictional defects were waived by appearing and arguing the motion. In that case a judge from Missouri had been sent to Colorado by designation. After his designated term had expired, he returned to Missouri. Thereafter he entertained a motion for a new trial, and entered an order thereon in the proper district. A question was raised as to his authority to hear that motion. The law then did not grant such authority to pass on new trial motions as it does now by Section 22 of the Judicial Code. Counsel, however, had argued it before him on the merits, so that the judge should not have to travel to Colorado. In deciding the motion the court said, per *Philips, J.* (pp. 105-106):

> "Counsel for both parties having agreed to waive the necessity or burden of such a trip to me, my right to pass upon the motion must be viewed as if I had gone to Colorado, or remained there in the first instance, to hear the motion. Unpleasant as it is to act under even the imputation of assuming authority, I feel

constrained to proceed in this matter under an imperative sense of official duty."

In conclusion, it is submitted that since Judge Inch had jurisdiction over the subject matter of probation, especially as he was the Trial Judge, and since neither the Probation Officer, nor District Attorney challenged Judge Inch's jurisdiction over the parties, after appearance by both of them, such defect, if any, must be deemed to have been waived, and the order of Judge Inch was, therefore, a valid one.

POINT V.

The visiting district judge before whom the case was tried and who placed defendant on probation, had power so long as he remained a district judge, to make Chambers orders affecting that case, relating to probation.

It is well settled that probation is informal. In *Burns* v. *U. S.*, 287 U. S. 216, this Court said, per *Hughes, C. J.* (p. 220):

> "To accomplish the purpose of the statute, *an exception degree of flexibility in administration is essential. It is necessary to individualize each case,* to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion." (Italics ours.)

In *Jianole* v. *U. S.*, 58 F. (2) 115 (C. C. A. 8, 1932), the court said, per *Van Valkenburgh, Ch. J.* (p. 117):

> "Everything points to the purpose of the Congress to lodge a very broad discretion in the *trial judge* in granting and revoking of probation. *To require formal proceedings would be subversive of the very purpose of the act.*" (Italics ours.)

In *Evans* v. *District Judge,* 12 F. (2) 64, page 65, (C. C. A. 6, 1926), it was expressly said that probation matters should *not* be the "subject of formal applications, hearings and orders".

Therefore, orders affecting probation may properly be made at Chambers.

Orders made at Chambers, though out of the district where they are to be effective, are valid orders.

In re Parker, 131 U. S. 221;
U. S. v. *Goldstein,* 271 F. 838 (C. C. A. 8, 1931);
Jianole v. *U. S.,* 58 F. (2) 115 (C. C. A. 8, 1932);
Apgar v. *U. S.,* 255 F. 16, p. 18;
Ex Parte Harlan, 180 F. 119, p. 129;
Dwyer v. *U. S.,* 170 F. 160;
Re Associated Gas & Elec., 83 F. (2) 734.

In the *Apgar* case, *supra,* the court said (p. 18):

> "Where the order is one which may be made at the chambers of the Judge, it *is not* necessary that it be made within the territorial limits of the district in which the order is to be effective, if it is made where the Judge at the time is performing the duties of his office."

In *McDowell* v. *U. S.,* 159 U. S. 596, the court said per *Brewer, J.* (pp. 598-9):

> "There is no constitutional provision restricting the authority of a District Judge to any particular territorial limits. District Courts are solely the creation of statute, and the place in which a judge thereof may exercise jurisdiction is subject absolutely to the control of Congress."

To like effect see *Gonzales* v. *Cunningham,* 164 U. S. 612, 622-35; 41 L. Ed. 572).

In the case of *U. S.* v. *Goldstein, et al.,* 271 F. 838 (C. C. A. 8, 1921), a judge of the District of Kansas was tempora-

fily assigned to the District Court for the Eastern District of Missouri, where he heard a case and entered a decree in a naturalization proceeding, wherein the defendant was declared to be a perjurer. After the term expired, the Judge returned to his own Court in Kansas. Three years later, a motion was made in that proceeding, returnable before the Judge in Kansas, notice of which was served on the District Attorney for Missouri. On the return date of the motion, both parties appeared before the Judge in Kansas and argued the matter on the merits, and moved for a continuance of the argument to another town in Kansas. No jurisdictional objections were made until the adjourned hearing, at which time the objections were overruled. After the hearing, an order was entered modifying the decree, and striking out the declaration that this particular defendant was a perjurer. The decree was then entered in the Missouri Court. On appeal, it was held that the decree was valid.

The *Goldstein* case, *supra,* was cited with approval in *Clarke* v. *Chicago, B. Q. R. Co.* (C. C. A., Wyo.; 1933), 62 F. (2) 440, page 442.

In *Dwyer* v. *U. S.*, 170, F. 160, the District Court sitting at Boise City was held to have authority to pass upon a motion for a new trial of a case which had been tried in the northern division then held at Moscow.

The general purpose of dividing the United States into judicial districts was for the convenient partition of the judicial business within the respective states.

Rosecrans v. *U. S.*, 1897, 165 U. S. 257, 41 L. Ed. 708.

The statutes effecting the division of a judicial district do not create new districts, nor establish new additional courts.

Therefore, it is submitted that there is no constitutional or legal bar which would prevent Judge Inch's order, made in Chambers in the Judge's home district from being effective in the district where the case was tried.

POINT VI.

The order of December 16, 1935, having been captioned in the "Southern District of New York" and duly entered in the "Southern District of New York", and being unvacated and un-appealed from, must be conclusively presumed valid.

It will be observed that the order of December 16, 1935 is properly captioned in the Southern District of New York (R. 28). It is also to be observed that this order was duly entered and filed in the Southern District of New York (R. 107), and that it is on file with the court (R. 107). No appeal has been taken from the order. The order has not been vacated, and though a motion was made to re-settle the order, it has not been re-settled.

It is also observed that the recitals of that order, contain the following words (R. 29):

> "* * * and due notice having been given to the Hon. E. Fred Sweet, Probation Officer for the Southern District of New York, and due deliberation having been had thereon."

In the case of *The Alaska,* 35 F. 555 (C. C. S. D.), an action pending in the Southern District of New York, was tried by consent, in the Eastern District, with another action that was pending there. Thereafter, a decree was made in the Southern District action, captioned in the Southern District, and duly entered and filed in the Southern District, though it was actually made and signed by the trial Judge while sitting in the Eastern District. It was there claimed that the decree was void, because the judge, sitting in the Eastern District, had no jurisdiction to hear the case, or to grant the decree. In holding the decree valid, the circuit court said, per *Blatchford, J.* (p. 557):

> "The decree of the district court for the Southern district in the present case appears on its face to have been made at a stated term of that court held within the limits of that district. * * * The record discloses no application to set aside the decree because such was not the fact, and it must be conclusively presumed that it was the fact, in view of the provisions of Sections 591-596 and 600 of the Revised Statutes [now equivalent to Title 28, Section 17 et seq. of the U. S. Judicial Code] under which Judge Benedict [of the Eastern District] could have been designated and empowered to hold the district court for the Southern district.

In *Clarke* v. *Chicago, B. & Q. Ry. Co.*, 62 F. (2) 440, 441 (C. C. A. Cert. denied 290 U. S. 629), where a visiting judge signed an order in an action, after he had returned to his own district, which order was captioned and entered in the original district, it was contested for lack of jurisdiction of the judge to make the order, but the court held,

> "The presumption is that the order was regularly and legally made *(The Alaska)*."

In *McDowell* v. *U. S.*, 159 U. S. 596, this court said, per *Brewer, J.* (p. 601):

> "Any defect in the order, if defect there was, is shown only by matters dehors the record."

To like effect see

U. S. v. *Goldstein*, 271 Fed. 838 (C. C. A. 8; 1931);
Columbus Chain v. *Standard Chain Co.*, 145 F. 186.

POINT VII.

At most, it can only be claimed that the order of December 16, 1935 was irregular, so it remains in full force and effect until vacated, which was never done.

Since Judge Inch had jurisdiction over the general subject matter of probationary proceedings (See Point III, *supra,* p. 33), it cannot be said in this case that Judge Inch's order was void for lack of jurisdiction. At most, the proceeding may have been irregular, insofar as the hearing, though held in chambers, may have been heard in the wrong district, and that, therefore, it was irregular as a matter of venue. Thus, at most, this order was merely irregular and not void, and the only way in which its validity could have been assailed was by a notice of motion to set aside the purported irregular order.

29 Cyc. 1522:

"An order *irregularly obtained is operative* until vacated."

See also

Parker Bros. v. *Fagan,* 68 Fed. (2) 616.

The only way this order was attacked was by moving to *resettle* the order, *not* to vacate it. Thereby, its validity as an order in this proceeding was recognized. In any event, it has *not* been vacated, nor even resettled, so it is "operative."

POINT VIII.

As the warrant was for violation of probation, and not for sentence, and as there was no probation to violate, the writ was properly sustained.

The Government's claim, that under *Section 725*, the defendant could be brought in for sentence, after the sentence period had expired, during the longest time for which the defendant could have been sentenced, is without merit, because the warrant here issued was not to bring the defendont in *for sentence*, but to charge the defendant with having allegedly *"violated one of the terms of his probation"* (R. 32), and the petition therefor specifically so charges (R. 34).

As has been seen, even if the criminal proceeding itself is not deemed terminated, at the very least, both the sentence probation period as well as the statutory probation period were terminated by the order of December 16, 1935 (see Point I, *supra*).

There being no probation of any kind open, which the defendant could have violated, had he done anything wrong, the warrant was improperly issued, and the Writ of Habeas Corpus was properly sustained.

If the defendant did anything wrong, he may be tried on that crime separately, as to which there is not even an indictment.

POINT IX.

The defendant may not now be sentenced on two of three indictments on which conditional probation was imposed, where sentence was imposed on the third indictment and under which the sentence was served and the fine paid.

The Circuit Court of Appeals is in error in distinguishing the instant case from *United States* v. *Greenhaus,* 85 F. (2d) 116 (C. C. A. 2, 1936). In *United States* v. *Greenhaus, supra,* cert. den. November 17, 1936, the Circuit Court held that where there are sentences upon several counts in a single indictment, the suspension of sentence to begin at termination of a prior one is unlawful, and hence an order of probation is invalid and execution of the sentence may be ordered. The opinion in the case at bar, decided May 10, 1937, held that "that rule does not apply to indictments which are separate and not consolidated", and the defendant was remanded for the consideration of the revocation of his probation and for sentence under the Probation Act (Sec. 725, Title 18, U. S. C.).

The distinction made between counts in a single indictment in *United States* v. *Greenhaus, supra,* and separate indictments in the instant case is not supported by the weight of authority. *Riggs* v. *United States,* 14 F. (2d) 5 (C. C. A. 4, 1926); *Freeman* v. *United States,* 227 Fed. 732, 740 (C. C. A. 2, 1915; *United States ex rel. Mignozzi* v. *Day,* 51 F. (2d) 1019 (C. C. A. 2, 1931); *Gillespie* v. *Walker,* 296 Fed. 330 (C. C. A. 4, 1924); Cf. *Vimmick* v. *Tompkins,* 194 U. S. 540; *In re De Bara,* 179 U. S. 316; *In re Henry,* 123 U. S. 372.

The three indictments here to which pleas of guilty were entered simultaneously arose out of the same series of transactions. They could have been consolidated under Section 557 of Title 18 U. S. C.

Under the second opinion of *United States* v. *Greenhaus*, decided April 20, 1937, the Court is limited to recommitting the defendant to serve the sentence *originally imposed.* In the case at bar, however, no sentence had been imposed on March 26, 1934 on two of the indictments.* and a proper sentence of two years and a fine of $1,000 was imposed on C 96-160. *Therefore, the complete sentence imposed on that date was served,* and it is now too late for the government to say that sentence should be changed after it has exacted the full penalties thereon from the defendant. To do so would be to punish the defendant twice for the same offense and doubly jeopardize him..

Furthermore, the sentence cannot be changed after the term in which it has been imposed has expired. *Santos* v. *Esola,* 50 F. (2d) 516; *Gillespie* v. *Walker, supra, Ex Parte Lange,* 18 Wall. 163, 167 (1873). Certainly not after sentence was served. Not even, where a part of the sentence which was imposed is illegal, for in that event, the legal part is the sentence and the excess is void. *Ex Parte Lange, supra,* In effect, the government is now seeking to change the sentence, by enlarging it.

This decision is in direct conflict with an opinion of the 10th Circuit; *White* v. *Burke,* 43 F. (2d) 329 (C. C. A. 10, 1930), which held that the District Court is without power to suspend a part of a sentence on the condition that defendant serve another part thereof.

It is significant to observe, in this regard, that the Government's brief below was inconsistent. Though in its Point I, the Government said that the suspension of imposition of sentence and the granting of probation under indictments C96-120 and C80-944 "were void in law," because of the *Greenhaus* decision (Aplt.'s Br., p. 8), in Point IV, the Govern-

* The difference in effect between the suspension of imposition of sentence and of suspension of execution on a sentence imposed is well settled, *United States* v. *Murray,* 275 U. S. 347; *Kriebel* v. *United States,* 10 F. (2d) 762; *United States* v. *Lecato,* 29 F. (2d) 694; 36 Op. Atty. Gen., 189; *State* v. *Liliopoulos,* 165 Wash. 197, 5 Pac. (2d) 319.

ment argued that the *Greenhaus* decision was itself wrong, citing numerous cases in support of that contention, and concluding as follows (p. 44):

> "Therefore U. S. v. Greenhaus, supra, is not supported by the weight of authority, *and the complete sentence imposed upon the defendant-appellee was a valid sentence.*"

So that if the principle of the *Greenhaus* decision is adhered to, its ruling would not apply here, because the facts here differ, no unserved sentence existing under the other two indictments. If, on the other hand, those principles of the *Greenhaus* case are not adhered to, because they are not in line with existing authority as claimed by the Government, then the suspension of imposition of sentence and granting of probation by the trial court, certainly was, as the Government conceded, correct and valid.

POINT X.

The application to have the court designate a place of incarceration, in which the defendant should serve a purported "unserved portion" of his alleged sentence, was properly denied, because no sentence was imposed upon the defendant on the two indictments involved, but, on the contrary, in both of those matters the imposition of sentence had been suspended.

The motion made by the Government on December 22, returnable December 28 (R. 117) was *not* a motion to sentence the defendant, but the petition therefor of Assistant District Attorney Shears expressly asked that:

> "* * * an order issue committing this defendant for the period of the unserved portion of his sentence of March 26, 1934, to wit, four years in a place to be des-

ignated by the Attorney General of the United States * * *" (R. 121).

There had been no sentence imposed on the defendant under either of the indictments to which that motion relates, namely, C 80-944 and C 96-120 (R. 117). The defendant had been put on probation for four years when the imposition of sentence was suspended. That is not at all the same as sentencing him to four years imprisonment.

A notice to sentence the defendant had been served upon both the defendant (R. 40) and his surety (R. 41), *but that application was never pressed.*

There having been no sentence imposed, *there was not any sentence under which the alleged "unserved portion" thereof could be served,* and the motion to have the court direct the defendant's commitment, for the alleged "unserved portion" of the non-existing sentence was properly denied.

CONCLUSION.

The orders of the Circuit Court of Appeals should be reversed and the orders of the District Court should be reinstated.

Respectfully submitted,

HARRIS JAY GRISTON, and
LOUIS KARASIK, Esqs.,
Attorneys for William Frad.

HARRIS JAY GRISTON, Esq.,
Of Counsel on the Brief.

APPENDIX.

Title 28 U. S. C. *Judicial Code, Section 22,* provides as follows:

> *"Any designated and assigned judge* who has held court in another district than his own shall have power, notwithstanding his absence from such district and the expiration of the time limit in his designation, *to decide all matters which have been submitted to him within such district,* to decide motions for new trials, settle bills of exceptions, certify or authenticate narratives of testimony, or perform any other act required by law or the rules to be performed in order to prepare any case so tried by him for review in an appellate court; and his action thereon in writing filed with the clerk of the court where the trial or hearing was had shall be as valid as if such action had been taken by him within that district and within the period of his designation Mar. 3, 1911, c. 231 §18, 36 Stat. 1089; Oct. 3, 1913, c. 18, 38 Stat. 203; Sept. 14, 1922, c. 306; §5, 42 Stat. 839)." (Italics ours.)

Title 28 U. S. C. *Judicial Code, Section 23,* provides as follows:

> *"Same; duty of district or circuit judge.* It shall be the duty of the district or circuit judge who is designated and appointed under either of sections 17 to 22 or this title, to discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district. (R. S. §595; March 3, 1911, c. 231, §19, 36 Stat. 1090.)"

Probation Act. (Act March 4, 1925, c. 521, as Amended June 6, 1930, c. 406 and June 16, 1933, c. 97; U. S. C. Title 18, Secs. 724-725).

Sec. 724: *Suspension of imposition or execution of sentences and placing of defendant upon probation; power of courts; revocation or modification of probation; duties of probationer.* The courts of the United States having original jurisdiction of criminal actions, except in the District Court of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation. This period of probation, together with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

Sec. 725. *Same; powers of probation officers; arrest of probationer.* When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The Court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, it may extend the probation as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest which

warrant may be executed by either the probation officer or the United States marshal of either the district in which the probationer was put upon probation or of any district in which the probationer shall be found and, if the probationer shall be so arrested in a district other than that in which he has been put upon probation, any of said officers may return probationer to the district out of which such warrant shall have been issued. *Thereupon such probationer shall forthwith* be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

Sec. 726. *Same; probation officers; appointment, etc.*—The judge of any United States court having original jurisdiction of criminal actions, except in the District of Columbia, may appoint one or more suitable persons to serve as probation officers within the jurisdiction and under the discretion of the judge making such appointment or of his successor. All such probation officers shall serve without compensation except that in case it shall appear to any such judge that the needs of the service require that there should be a salaried probation officer, such judge may appoint one such officer and shall fix the salary of such officer subject to the approval of the Attorney General in each case. Probation officers who are to receive salaries shall be appointed after competitive examination held in accordance with the laws and regulations of the civil service of the United States. Such judge may in his discretion remove any probation officer serving in his court. The appointment of probation officers shall be in writing and shall be entered on the records of the court of the judge making such appointment, and a copy of the order of appointment shall be delivered to the officer so appointed. Such court may allow any probation officer his actual expenses necessarily incurred in the performance of his duties. Such salary and expenses when duly approved

shall be paid from the appropriations for courts in which such officer serves. (Mar. 4, 1925, c. 521, sec. 3, 43 Stat. 1260.)

Sec. 727. *Same; duties of probation officers.*—It shall be the duty of a probation officer to investigate any case referred to him for investigation by the court in which he is serving and to report thereon to the court. The probation officer shall furnish to each person released on probation under his supervision a written statement of the conditions of probation and shall instruct him regarding the same. Such officer shall keep informed concerning the conduct and condition of each person on probation under his supervision and shall report thereon to the court placing such person on probation. Such officer shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid persons on probation and to bring about improvements in their conduct and condition. Each officer shall keep records of his work; shall keep accurate and complete accounts of all moneys collected from persons under his supervision; shall give receipts therefor, and shall make at least monthly returns thereof; shall make such report to the Attorney General as he may at any time require; and shall perform such other duties as the court may direct. A probation officer shall have the power of arrest that is now exercised by a deputy marshal. (Mar. 4, 1925, c. 521, Sec. 4, 43 Stat. 1260.)

Sec. 728. *Duties of Attorney General affecting Probation officers, investigations, collection of information, record, forms and statutes, rules, enforcement of laws, annual report.* The Attorney General or his authorized agent shall investigate the work of the Probation Officers and make recommendations concerning the same to the respective Judges and shall have access to the records of all Probation Officers. He shall collect for publication statistical and other information concerning the work of the Probation Officers. He shall prescribe record forms, and statistics to be kept by the Probation Officers and shall formulate general rules for the proper conduct of the probation work. He shall endeavor by all suitable means to promote the efficient administration of the pro-

bation system and the enforcement of the Probation Law in all U. S. Courts. He shall incorporate in his annual report a statement concerning the operation of the probation system in such courts. (Mar. 4, 1925, Chap. 521, Sec. 4 as added June 6, 1930 Chap. 406, Sec. 2 also in 46 Stat. 503. See note to Section 726.)

Sec. 557. *Same; Joinder of charges.* When there are several charges against any person for the same act or transaction; for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in several counts and if two or more indictments are found in such case, the court may order them to be consolidated. Revised Statutes, Section 1024.